

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

DAVID GODWIN FRANK,

Plaintiff,

v.

UNITED STATES OF AMERICA ,

Defendant.

**ORDER and
MEMORANDUM DECISION**

Case No. 2:11cv334

Criminal Case No. 2:08-cr-822 CW

Judge Clark Waddoups

On April 8, 2011, the court issued an Order in which it construed two motions by David Godwin Frank to be a petition under 28 U.S.C. § 2255 to correct the court's judgment to clarify that Mr. Frank is to be in home confinement and not committed to the United States Bureau of Prisons. In response to that order, the government has suggested that rather than construe Mr. Frank's motions as a § 2255 petition, the court should treat the motions as invoking Fed.R.Crim.P. 36, which allows the court to correct clerical errors in a judgment. The government further recommends that it is appropriate in this case that the court correct its judgment to state that Mr. Frank be allowed to serve his four months of work release in local confinement.

As noted in its April 8 Order, courts have been warned not to construe motions as § 2255 petitions except when proper warnings are given to prisoners. In this case, Mr. Frank was not given an opportunity to respond to the court's intention to construe his motions in that fashion. Accordingly, the court will follow the government's suggestion that Mr. Frank's motions are more appropriately viewed as requests that this court exercise its power to correct errors pursuant

to Rule 36. The court thus VACATES its order of April 8, 2010 to the extent that it construed Mr. Frank's motions as a § 2255 petition. This civil case is therefore CLOSED and the government need not respond to the petition. Moreover, the court GRANTS Mr. Frank's motion to correct the error in its sentence pursuant to Rule 36. A second amended judgment will today be placed on the docket of Mr. Frank's criminal case that clarifies that Mr. Frank is not to be committed to the Bureau for incarceration, but rather shall be allowed to serve his four months of work release in local confinement.

DATED this 15th day of April, 2011.

BY THE COURT:



Clark Waddoups
United States District Judge